Simon v. Adzilla, Inc [New Media] et al Doc. 592

EXHIBIT 1

(PUBLIC-REDACTED VERSION)

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CONNECTU, INC., HOWARD WINKLEVOSS, CAMERON WINKLEVOSS, TYLER WINKLEVOSS AND DIVYA NARENDRA, Petitioners,	:	Index No.
v.	:	
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP, Respondent.	:	

AFFIRMATION OF SEAN F. O'SHEA IN SUPPORT OF PETITIONERS' APPLICATION FOR A PERMANENT STAY PURSUANT TO 7503(b) AND FOR A TEMPORARY STAY PENDING DETERMINATION OF THE APPLICATION FOR PERMANENT STAY

SEAN F. O'SHEA, an attorney duly admitted to practice in the courts of the State of New York, affirms:

1. I am a member of the firm of O'Shea Partners LLP, attorneys for Petitioners. I submit this affirmation in support of Petitioners' Application for (a) a Permanent Stay, pursuant to CPLR 7503(b), of the Arbitration referenced; and (b) a temporary stay of the referenced Arbitration pending the Court's determination of Petitioners' Application for a Permanent Stay.

A Permanent Stay Should Be Granted

2. A true and correct copy of the September 17, 2007 engagement letter ("Engagement Letter") between Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel") and Petitioners is annexed hereto as Exhibit A.

3. On or about April 24, 2008, Respondent filed a demand ("Demand") with the American Arbitration Association (AAA), captioned *Quinn Emanuel Urquhart Oliver & Hedges, LLP v. Howard Winklevoss et al.*, No. 13 194 Y 00995 08, seeking legal fees o[redacted] A true and correct copy of the Demand is annexed hereto as Exhibit B. **Redacted**

4. For the reasons set forth in the accompanying Verified Petition and the Memorandum of Law in Support of the Petition, Petitioners respectfully request that the Court grant Petitioners' Application for a Permanent Stay of the Arbitration pursuant to CPLR 7503(b).

A Temporary Stay Should Be Granted

5. On May 6, 2008, Petitioners notified Respondent of its position that the dispute is not subject to arbitration.

6. By emails dated May 8, 2008 and May 12, 2008 Respondent stated that he would proceed in court and would not proceed with the arbitration.

7. On June 4, 2008, the AAA confirmed the parties' understanding that the AAA would not proceed with the arbitration based on the Respondents' representations.

8. On June 26, 2008, Respondent, without any legitimate basis, requested that AAA reinstitute arbitration proceedings. Respondent purportedly based the request on a decision of a U.S. District Court in California to enforce a putative settlement agreement between Petitioners and Facebook, Inc.. The status of the litigation between Petitioners and Facebook, however, was not the basis for the AAA's suspension of the arbitration.

9. On July 3, 2008, over the objection of Petitioners, the AAA notified the parties that it was reinstituting the proceedings, and that Petitioners' response to certain items was due on July 10, 2008. On July 8, 2008 the AAA granted Petitioners until July 17, 2008, to respond to its July 3, 2008 Notice.

10. The Court should grant a temporary stay of the referenced Arbitration pending its determination of Petitioners' Application for a Permanent Stay of Arbitration.

11. *First*, if the temporary stay is not granted, Petitioners will be forced either (i) to participate in the Arbitration, in which case the Application may be rendered moot as Petitioners could prejudice their right to object to arbitrability in court, or (ii) to allow the Arbitration to proceed without their participation, which may severely prejudice them in the Arbitration should the Court ultimately decide that the dispute is arbitrable. To avoid such inadvertent inequity from occurring, a temporary stay of the Arbitration should be granted.

12. *Second*, there is no particular urgency to the resolution of Respondent's claim for attorney's fees and Respondent will not be prejudiced by a temporary stay. The proceeds of the alleged settlement upon which Respondent's claim for attorney's fees is based, have been ordered into an escrow to be maintained by a Special Master by Order of the U.S. District Court in California.

13. *Third*, Petitioners claim for legal fees are not ripe, as the federal action upon which the contingent fee demand is based, is ongoing. Petitioners are appealing the order enforcing the settlement.

14. *Fourth*, a temporary stay of the arbitration will benefit all parties because all parties will be spared from the expenses of proceeding with the arbitration of a dispute that this Court may ultimately deem not subject to arbitration.

15. *Fifth*, Respondent cannot claim prejudice because until July 3, 2008, the referenced Arbitration had been held in abeyance pursuant to Respondent's representation to Petitioners and to the AAA that he would proceed in court. Respondent was more than content with the arbitration being held in abeyance for over two months without any claim of prejudice.

16. On July 15, 2008, my office notified Respondent of this application for a permanent and temporary stay of the arbitration and requested that Respondent agree to a temporary suspension of arbitration to spare the parties and the court the unnecessary cost of litigation. Respondent would not so agree.

17. No previous application has been made for the relief requested herein.

18. For the foregoing reasons, and for the reasons set forth in the accompanying Petition and the Memorandum of Law in Support of the Petition, Petitioners respectfully request that the Court (a) grant Petitioners' Application for a Permanent Stay of the Arbitration and (b) Temporarily Stay the Arbitration pending the Court's determination of the Application for a Permanent Stay.

Dated: New York, New York
July 16, 2008

Sean F. O'Shea

Exhibit A

WRITER'S DIRECT DIAL NO.
212/849-7231

WRITER'S INTERNET ADDRESS
rickwerder@quinnemanuel.com

September 17, 2007

ATTORNEY WORK PRODUCT
ATTORNEY-CLIENT PRIVILEGE

By Electronic Delivery

ConnectU, Inc.
c/o Winklevoss LLP
2 Greenwich Office Park
Greenwich, CT 06831
Attn.: Howard Winklevoss

Re: ***Facebook Litigation***

Dear Howard:

Thank you for retaining Quinn Emanuel Urquhart Oliver & Hedges, LLP ("the Firm") to represent ConnectU, Inc. ("ConnectU") and its founders in connection with the prosecution of claims relating to the Facebook website.

We are writing to set forth the terms of this engagement.

Scope of Engagement: We will represent ConnectU, as well as Cameron Winklevoss, Tyler Winklevoss, and Divya Narenda (the "Clients") in the pending litigation in the United States District Court for the District of Massachusetts (the "Action"). Each of the Clients will sign this engagement letter, and you will sign as the authorized representative and signatory for ConnectU and as the guarantor of the financial obligations of your sons and ConnectU undertaken herein. Peter Calamari, Rick Werder, and Bill Price will lead this engagement. Unless otherwise agreed or terminated by either you or us, our engagement will end and our fee will be fully earned when a final judgment has been entered by the trial court, or there has been a final resolution by way of an agreement between the parties. "You" and "your" as hereinafter used in this letter shall refer to the Clients and Howard Winklevoss collectively.

The scope of this engagement does not include appeals from any judgment or order of the trial court. Such appeals, if any, may be the subject of a separate discussion and engagement. Also not included in the scope of this engagement are services you may request in connection with any other matter, action or proceeding, except that we will act as consultants in the pending California action (the "California Case") and, with the mutual agreement and consent of you and the Firm, take over the defense of the California Case if it appears that doing so is necessary in order to implement an overall strategy designed to maximize recovery in the Action.

Our Fees: The amount we will receive for our attorneys' fees for the legal services we provide under this agreement will be 20% of the value of any settlement or judgment in the Action or any value that the Clients receive in connection with the Facebook website. You understand that contingency fees are not set by law, but are subject to negotiation between a lawyer and client and that the contingency fee we have agreed upon was the subject of such a negotiation.

For the purpose of calculating our attorneys' fees, the "value" of any recovery will be the gross amount received as a result of any arbitration award, judgment, order, or settlement or the value of any stock or other things of value provided in lieu thereof, including any award of attorneys' fees and interest and excluding any award of costs. The gross amount of the recovery is that amount paid before any reduction for costs and expenses, including but not limited to those described in the following section of this agreement entitled "Costs and Billing Practices"; in other words, the "value" will not be reduced by the amount of any costs incurred, or by any sum you may be obligated to pay other lawyers who provided services to you in the Action or the California Case.

In the event our representation is terminated as provided herein, you agree that we will be entitled to the reasonable value of our services as determined by an arbitration panel or mutual agreement, the arbitrators being specifically authorized to apply a multiple to the Firm's hourly rates based upon the risk undertaken by the Firm in accepting this representation on a contingent basis and the value of the services provided by the Firm in relation to the total value of all services provided to you by your counsel in the Action. An arbitration award based on a multiple of our hourly rates will not exceed the 20% fee set forth above.

ConnectU agrees to indemnify us and hold us harmless from any claims by any other attorneys or third parties retained by the Clients or claiming a right to any sums payable to us under this agreement unless we have agreed, in writing, to associate them into the case. You and the Clients have represented that you are unaware of any claims by third parties other than our predecessor counsel in Massachusetts and know of no facts adverse to the claims set forth in the complaint filed in Massachusetts except as noted in the pleadings filed in said case as of this date. You shall be solely responsible for all legal fees, hourly or contingent, which your former counsel are entitled to receive as a result of their representation of you in the Action.

Costs and Billing Practices: Costs will be paid under this agreement in the following manner:

(a) ConnectU is responsible for the payment of all costs and expenses.

(b) ConnectU is responsible for paying directly the fees and expenses incurred by any counsel other than the Firm involved in the Action and/or the California Case.

(c) ConnectU is responsible for the costs incurred in terminating your relationship with your current counsel and extinguishing any lien they may have on any judgment or settlement that might be obtained at the earliest possible date. All risks concerning the resolution of issues with existing counsel will be borne by the Clients, and will not affect the calculation of our fees. In other words, if the lien of predecessor counsel is not extinguished, the risk of same shall be born by ConnectU, its shareholders, and you.

We will send out invoices on a monthly basis setting forth a summary description of our professional services and itemizing any associated costs and expenses. Costs and expenses include, but are not limited to, deposition transcription fees, expert/consulting fees, local counsel fees, document photocopying, scanning and management fees, in-house disbursements such as postage, telephone charges, photocopying, word processing, delivery, computer-assisted research, etc., as well as reasonable client-related travel, lodging, and other expenses. We request and expect that invoiced costs shall be paid promptly, no later than 30 days after receipt, and we reserve the right to terminate our representation if invoices are more than 30 days past due. We also reserve the right to charge 1% per month interest on any unpaid balance that remains outstanding for more than 60 days. Said interest shall not be any higher than the maximum amount permitted by law, and may be lower. Each of you shall be jointly and severally liable for all costs incurred, as well as all other financial obligations under this agreement.

All proceeds of any settlement or award shall be paid into a trust account on behalf of the Clients and our Firm and be subject to setoff of any outstanding fees or costs owed to us under this agreement.

Award of Costs and Fees: A court or arbitration panel may sometimes order a payment of costs or attorneys' fees by one party to the other. If any such attorneys' fees are awarded to us or our Client(s) by a court, arbitration panel, or other tribunal, the awarded fees will be added to the "value" of any settlement or award upon which our fee is based. Costs awarded to us or our Client(s) shall not be added to the "value" of any settlement or award upon which our fee is based. If a court or arbitrator awards fees or costs against any Client and in favor of an opposing party, the Client will be responsible for payment of that amount separately from any amounts due to us and without regard to the outcome of the case.

Our Lien Over Your Recovery: You hereby grant the Firm a lien over any judgment, arbitration award, settlement, or other recovery you may obtain in the Action. The lien shall be for the purpose of securing our attorneys' fees, reimbursement of costs, and all of your other financial obligations under this Agreement.

No Guarantee of Results: All litigation is by definition inherently risky and unpredictable. Consequently, although we may offer an opinion about the possible or probable course or results of our engagement, we cannot and do not guarantee or represent that we can obtain any particular result.

Commitment of Cooperation: During the course of this engagement, you will cooperate fully by providing us with all relevant information, as well as access to documents, knowledgeable officers and/or employees, and other materials that may be germane to the engagement. You also agree that you will not bring any other action(s) regarding the Facebook website.

Termination and Withdrawal: Any Client is entitled to terminate this engagement at any time by written notice effective when we receive it. Unless we agree otherwise in writing, we will provide no further services on behalf of a Client after we receive such notice.

In the unlikely event that circumstances make it necessary to do so, we reserve the right, subject to ethical and professional obligations, to withdraw from representing any Client at any time including, but not limited to, if we determine that any of our Clients' conduct has made it unreasonably difficult for us to carry out our representation effectively, your failure to pay for any costs or disbursements upon request, or any other circumstances that make our representation of you hereunder impractical.

If our engagement is terminated by the entire group of Clients or we withdraw from our representation, we will immediately be entitled to be reimbursed for all costs (including expenses) we have incurred before withdrawing (the "Termination Fees and Costs"). If our fees and costs are not paid within 60 days of your receipt of any settlement or award in the Action, you agree that we will be entitled to interest on the unpaid balance of fees and costs at the rate of 1.5% per month until paid. If our engagement is terminated by the entire group of Clients or we withdraw from our representation under the terms of this agreement, we shall be entitled to the reasonable value of our services.

Settlement: Each Client has the absolute right to settle their claims separately from other Clients and to accept or reject any settlement. We will not settle your claim without approval. In the event a joint settlement proposal is made, we will seek consent from each of you before entering into a settlement.

Waiver of Conflict: Our firm has many lawyers and several offices. We may in the future represent one or more other clients in matters involving one or more Clients or their affiliates, subsidiaries, or parent entities. We are undertaking this engagement on condition that we may represent other clients in matters in which we do not represent a Client even if the interests of the other clients are adverse to a Client or its affiliate, subsidiary, or parent entities, including the appearance on behalf of another client adverse to a Client or its affiliate, subsidiary, or parent entities in litigation or arbitration, provided that the other matter is not substantially related to our representation of a Client and that in the course of representing a Client we do not obtain confidential information from a Client material to the representation of the other clients. If an attorney does not continue an engagement or is required to withdraw from a matter due to a conflict of interest, the client may incur delay, prejudice or additional cost associated with acquainting new counsel with the matter. Your express consent to this arrangement is required, however, because of the arrangement's possible adverse effects on the performance of our duties as attorneys to remain loyal to each client, to maintain client confidences, and to render legal services with vigor and competence.

Joint Representation: An undertaking by a lawyer or law firm to represent multiple clients in the same matter is called a "joint representation." Such an arrangement permits certain savings of costs that otherwise would be incurred if each client retained separate counsel. The applicable rules of professional responsibility permit the representation of clients in the same matter provided that the lawyer or firm can adequately represent each client's interests and each client knowingly consents to the joint representation.

As in any case involving multiple plaintiffs, the interests of the co-plaintiffs may diverge during the course of the litigation, even though they do not actually conflict. For example, one plaintiff may prefer a quick settlement of the matter while another desires a vigorous prosecution. Although we are not currently aware of any actual or reasonably foreseeable adverse effects of joint representation, it is possible that issues may arise in which our representation of one of you may be materially limited by our representation of another. If such circumstances arise, we must together evaluate whether continued joint representation is appropriate, as discussed below.

We understand that none of you objects in any way to the Firm representing you in this matter and that, to the extent that any potential conflict may exist or appear to exist, you each waive any such conflict. Based on the information we have received as of the date of this letter, we are not aware of any conflict of interest that would preclude the Firm from representing each of you in this matter. Further, by signing this agreement, each of the individuals hereby delegates their control of this litigation to Dr. Howard Winklevoss, including the right o settle and control the work of our Firm, and each represents that we may look solely to Dr. Howard Winklevoss for our instructions in this case

If at any time you have any concerns about the appropriateness of continued joint representation, you should let us know immediately so that we can reevaluate the Firm's continuing representation of each of you. If we become aware of any such circumstances, we will do the same.

In the event that joint representation is no longer appropriate, by virtue of any adversity, dispute, or conflict that may arise between any of you, we will determine which of you we will continue to represent and will offer to assist the others to find appropriate substitute counsel. You agree that, in such circumstances, you will consent to the Firm's continued and future representation of those whom we elect to continue to represent and will not seek to disqualify the Firm from such representation, and will assent to the Firm's withdrawal as attorney of record for you. In the event that the Firm withdraws from representing any of you, we will, of course, take reasonable steps to avoid any reasonably foreseeable prejudice. In addition, if you proceed to accept the benefit of our services in this matter, that will indicate and confirm your agreement: (i) that the Firm's representation of you hereunder will not be deemed a conflict and shall not disqualify the firm from representing any other member of the group in an unrelated matter when that member may have interests that are or may be adverse to you or your company; and (ii) that you not seek to disqualify the Firm from any such representation.

In the ordinary one lawyer/one client relationship, confidential communications between the lawyer and the client are privileged from disclosure to any third party without the client's consent. This privilege also exists in a joint representation with an important qualification: a confidential communication between the lawyer and client may not be disclosed to third parties, but may be shared with other jointly-represented clients. In other words, any communication between you and us (or other lawyers of the Firm) relating to the prosecution of this action may be disclosed to the clients who agree to this joint representation.

Dispute Resolution: Although unlikely, it is possible that a dispute may arise that cannot be resolved by discussions between us. We believe that some disputes can be resolved more expeditiously and with less expense by binding arbitration than in court. Any dispute regarding or arising out of our representation will be resolved by binding arbitration under the Commercial Rules of the American Arbitration Association ("AAA") before three arbitrators appointed from the AAA's Large Complex Commercial Case Panel. The arbitrators will have the authority to determine whether the dispute is arbitrable. The arbitration will be governed by both the procedural and substantive provisions of the Federal Arbitration Act. The arbitration will be held in the County of New York.

As provided by New York law, you may, under certain circumstances, elect not to arbitrate disputes concerning the amount of fees owed to us. A copy of the relevant rules will be provided upon request. Any disputes concerning the amount of fees owed to us that are not arbitrated will be subject to the jurisdiction of courts located in the County of New York.

Any dispute or claim (other than one to recover unpaid legal fees and expenses), whether arbitrable or not, arising out of our representation and lawyer-client relationship will be brought within one year of the termination of our relationship or it will be barred.

New York law (without regard to its choice of laws principles) will govern any dispute or claim related to or arising out of this agreement, whether in arbitration or in the courts.

We would appreciate your confirming receipt and agreement to the foregoing terms. Each individual Client's signature below will constitute that Client's agreement that the agreement has been duly executed by an authorized representative of ConnectU with authority to bind ConnectU to the terms of this agreement. We encourage you to seek review of this agreement by counsel of your choice. At your earliest convenience please countersign this letter in the space provided below and return it to me (by mail or fax). Unless we hear otherwise from you immediately, we will assume that these terms are acceptable and proceed accordingly with our work. If you request that we perform work on this engagement after receipt of this letter, we will assume that you have agreed to its terms, even though you have not yet returned an executed copy to us, and the terms hereof will be applicable to our work.

Thank you for having confidence in our Firm. We appreciate this opportunity to represent you in this matter and look forward to working with you.

Sincerely,

Richard I. Werder, Jr.

Accepted and Agreed:

ConnectU, Inc.

By ______________________________

Its ______________________________

____

Cameron Winklevoss

____

Tyler Winklevoss

______________________________ 9/24/2007

Divya ~~Narenda~~ Narendra

____

Howard Winklevoss, as guarantor

Accepted and Agreed:

ConnectU, Inc.

By ______________ CAMERON WINKLEVOSS 9/24/07

Its PRESIDENT

______________ 9/24/07

Cameron Winklevoss

______________ 9/24/07

Tyler Winklevoss

____

Divya Narenda

____

Howard Winklevoss, as guarantor

ConnectU, Inc.
September 17, 2007
Page 8

Accepted and Agreed:

ConnectU, Inc.

By ____________________
Its ____________________

____
Cameron Winklevoss

____
Tyler Winklevoss

____
Divya Narenda

____
Howard Winklevoss, as guarantor

GL590/2209843.1

Exhibit B

ONLINE FILING DEMAND FOR ARBITRATION/MEDIATION FORM

This concludes your filing.

Thank you for submitting your claim to the AAA.

Your claim confirmation number is: 002-4XF-APG

To institute proceedings, please send a copy of this form and the Arbitration Agreement to the opposing party.

Your dispute has been filed in accordance with:	Commercial Dispute Resolution Procedures
This claim has been filed for:	Arbitration
Filing Fee:	$12,800.00

Additional Claim Information

Claim Amount:	[redacted]
Claim Description:	Claimant seeks attorneys' fees of not less than [redacted] as well as all unpaid expenses, pursuant to its letter agreement with Respondents dated September 17, 2007. Claimant represented Respondents on contingency. Claimant secured a highly favorable result for Respondents, but Respondents have terminated Claimant and refuse to pay or acknowledge Claimant's full fee.
Arbitration Clause:	See uploaded document at p. 6
Hearing Locale Requested:	New York, NY
Contract Date:	09/17/2007
Number of Neutrals:	1

Redacted

Claimant 1

Type of Business: Partnership

Name:
Company Name: Quinn Emanuel Urquhart Oliver & Hedges, LLP
Address: 51 Madison Avenue
New York, NY 10010
Telephone: 212-849-7000
Fax: 212-849-7100
Email: null
Include in caption: Company

Representatives

Name: Richard I. Werder, Jr.
Company Name: Quinn Emanuel Urquhart Oliver & Hedges, LLP
Address: 51 Madison Avenue
New York, NY 10010
Telephone: 212-849-7000
Fax: 212-849-7100
Email: rickwerder@quinnemanuel.com

Respondent 1

Howard Winklevoss

Type of Business: Unknown / Blank Demand

Name:	**Howard Winklevoss**
Company Name:	null
Address:	Two Greenwich Office Park Greenwich, CT 06831
Telephone:	203-861-5500
Fax:	null
Email:	null
Include in caption:	Individual

Representatives

Name:	**David Barrett**
Company Name:	Boies, Schiller & Flexner LLP
Address:	575 Lexington Avenue New York, NY 10022
Telephone:	212-446-2300
Fax:	null
Email:	dbarrett@bsfllp.com

Respondent 2
Cameron Winklevoss
Type of Business: Unknown / Blank Demand

Name:	**Cameron Winklevoss**
Company Name:	null
Address:	Two Greenwich Office Park Greenwich, CT 06831
Telephone:	203-861-5500
Fax:	null
Email:	null
Include in caption:	Individual

Representatives

Name:	**David Barrett**
Company Name:	Boies, Schiller & Flexner LLP
Address:	575 Lexington Avenue New York, NY 10022
Telephone:	212-446-2300
Fax:	null
Email:	dbarrett@bsfllp.com

Respondent 3
Tyler Winklevoss
Type of Business: Unknown / Blank Demand

Name:	**Tyler Winklevoss**
Company Name:	null
Address:	Two Greenwich Office Park Greenwich, CT 06831
Telephone:	203-861-5500
Fax:	null
Email:	null
Include in caption:	Individual

Representatives

Name:	**David Barrett**
Company Name:	Boies, Schiller & Flexner LLP

Address:	575 Lexington Avenue New York, NY 10022
Telephone:	212-446-2300
Fax:	null
Email:	dbarrett@bsfllp.com

Respondent 4
Divya Narendra
Type of Business: Unknown / Blank Demand

Name:	**Divya Narendra**
Company Name:	null
Address:	Two Greenwich Office Park Greenwich, CT 06831
Telephone:	203-861-5500
Fax:	null
Email:	null
Include in caption:	Individual

Representatives

Name:	**David Barrett**
Company Name:	Boies, Schiller & Flexner LLP
Address:	575 Lexington Avenue New York, NY 10022
Telephone:	212-446-2300
Fax:	null
Email:	dbarrett@bsfllp.com

Respondent 5
Type of Business: Service / Product Provider

Name:	
Company Name:	ConnectU, Inc.
Address:	Two Greenwich Office Park Greenwich, CT 06831
Telephone:	203-861-5500
Fax:	null
Email:	null
Include in caption:	Company

Representatives

Name:	**David Barrett**
Company Name:	Boies, Schiller & Flexner LLP
Address:	575 Lexington Avenue New York, NY 10022
Telephone:	212-446-2300
Fax:	null
Email:	dbarrett@bsfllp.com

To institute proceedings, please send a copy of this form and the Arbitration Agreement to the opposing party.

Your demand/submission for arbitration/mediation has been received on 04/24/2008 09:28 EST.